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20 **UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA
22 OAKLAND DIVISION**

23 J. DOE 1, et al.,

24 Individual and Representative Plaintiffs,

25 v.

26 GITHUB, INC., et al.,

27 Defendants.

28 Case Nos. 4:22-cv-06823-JST
4:22-cv-07074-JST

**PLAINTIFFS' STATEMENT IN
SUPPORT OF DEFENDANTS GITHUB
AND MICROSOFT'S LOCAL RULE 79-
5(f) ADMINISTRATIVE MOTION TO
CONSIDER WHETHER ANOTHER
PARTY'S MATERIAL SHOULD BE
SEALED**

I. INTRODUCTION

Pursuant to Local Rule 79-5(f)(3) and ECF No. 79, Plaintiffs submit this statement (“Statement”) in support of Defendants GitHub and Microsoft’s Local Rule 79-5(f) Administrative Motion to Consider Whether Another Party’s Material Should Be Sealed (ECF No. 74) (the “Sealing Motion”).¹

II. ARGUMENT

Courts “recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quotation marks omitted). Courts have “carved out an exception” to the compelling reasons standard for “materials attached to a . . . motion unrelated to the merits of the case.” *Id.* at 1097–99. “[P]ublic access will turn on whether the motion is more than tangentially related to the merits of a case.” *Id.* at 1101. “Under this exception, a party need only satisfy the less exacting ‘good cause’ standard. The ‘good cause’ language comes from Rule 26(c)(1), which governs the issuance of protective orders in the discovery process: ‘The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense’” *Id.* at 1097 (quoting Fed. R. Civ. P. 26(c)) (citations omitted).

Here, the letter containing Plaintiffs' redacted names was attached to the GitHub Defendants' opposition to the Confidentiality Motion. The content of that motion has no bearing on the merits of the case. Even if Plaintiffs' names may eventually be relevant to a dispositive motion, they may be provisionally filed under seal, as ECF No.74-2 was. Additionally, this Sealing Motion is not the final word on the confidentiality of Plaintiffs' names. Shortly after it is decided, the Court will hear and rule on the Confidentiality Motion, which is fully briefed and will be heard less than one week from the date this Statement is filed.

¹ To avoid confusion, Plaintiffs note this Statement is only applicable to ECF No. 74. The GitHub Defendants have since filed another Sealing Motion (ECF No. 80), which Plaintiffs will file a statement in support of on or before Monday, May 1, 2023, per Local Rule 79-5(f)(3).

1 The short effective lifespan of the ruling on this Sealing Motion necessarily means no
 2 party will be prejudiced by the Court's decision on it before that decision is superseded by the
 3 Court's decision on the Confidentiality Motion. None of the harms raised in the GitHub
 4 Defendants' opposition to the Confidentiality Motion could impact Defendants or the public
 5 before the it is decided.²

6 If Plaintiffs' true names are revealed now, the Confidentiality Motion will become moot,
 7 because the public's knowledge of Plaintiffs' names cannot be undone. All the harms Plaintiffs
 8 may suffer, as set forth in their filings supporting the Confidentiality Motion will trigger.³ All the
 9 arguments in favor of allowing Plaintiffs to proceed under pseudonyms in the Confidentiality
 10 Motion's Memorandum of Points and Authorities, the supporting Reply, and the supporting
 11 declaration are hereby incorporated by reference. *See* ECF Nos. 71, 71-1, 77, 77-1, 77-2.
 12 Collectively, Plaintiffs' submissions in support of their Confidentiality Motion provide adequate
 13 basis to satisfy the more stringent compelling reason standard, let alone the good cause standard
 14 applicable here when balanced against the prospective harms identified by Defendants. Thus, the
 15 Sealing Motion should be granted.

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² The potential harms Defendants identify are that Defendants will be impeded in investigating
 18 Plaintiffs' claims and that the public, specifically members of the class, will be unable to
 19 determine whether to remain in the class and evaluate the adequacy of Plaintiffs as
 20 representatives of the class. ECF No. 75. Absent class members will have no opportunity or need
 21 to make any decisions about remaining in the class or Plaintiffs' adequacy before the
 22 Confidentiality Motion is resolved. Defendants will have no need to investigate Plaintiffs while
 23 their Motions to Dismiss are still pending, which will almost certainly not be decided prior to the
 24 Confidentiality Motion, as they will be heard on the same day and the Motions to Dismiss contain
 25 far more complicated issues than the Confidentiality Motion. *Compare* ECF Nos. 71, 75 & 77 to
 26 ECF Nos. 50, 53, 66, 67, 72 & 73.

27 ³ As set forth in the Confidentiality Motion, Plaintiffs have reasonable fears of significant
 28 potential harms, including for their physical safety and livelihoods. *See, e.g.*, ECF Nos. 71
 ("Plaintiffs filed under pseudonyms because they reasonably feared they would be subject to
 threats of retaliation and violence. Unfortunately, those fears were well-founded. Plaintiffs,
 though their counsel, have received legitimate and credible threats of physical violence."), 71-1,
 77 ("Plaintiffs themselves have found these threats to their attorneys to be dangerous and would
 have serious concern for their safety had their identities not been protected and they were to
 receive such threats themselves."), 77-1, 77-2 (describing Plaintiffs' reasonable fears of the
 consequences of losing AEO designation for their names).

III. CONCLUSION

For the reasons stated above, Plaintiffs request the portion of Exhibit 1 to the Hurst Declaration containing Plaintiffs' true names be filed under seal, in accordance with Defendants' Proposed Order (ECF No. 74-1), which was filed in support of the Sealing Motion.

Dated: April 28, 2023

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